

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2787 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

CHIMANBHAI MOTIBHAI PATEL

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 2787 of 2001
MR. N.D. NANAVATI, LD. SR. COUNSEL WITH
MR PRADEEP PATEL for Petitioner No. 1-2
MS. KATHA GAJJAR, AGP for Respondent No. 1
MR. S.B. VAKIL, LD. ADVOCATE, WITH MR. SHIRISH JOSHI
for Respondent No. 2

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 19/09/2001

C.A.V. JUDGEMENT

Chimanbhai Motibhai Patel and Bhurabhai Vashrambhai Ayar-petitioners have filed this petition under Articles 226 and 227 of the Constitution of India praying for issuance of writ of certiorari, order or direction quashing and setting aside the order dated 10.4.2001 passed by the Gujarat State Co-operative Tribunal (hereinafter referred to as the 'Tribunal') in Revision Application No. 143 of 2001. It has been stated that the Tribunal was pleased to confirm the order passed below Exh. 4 in the said Revision Application. The Tribunal has held that both petitioners were defaulters at certain stage in their respective accounts and therefore as per the bye-law 36(7) they would be incurring disqualification. It is the duty of director to regulate the defaulters and therefore such disqualification cannot be viewed lightly. In such circumstances, order passed by the learned Nominee does not call for interference. However, the Tribunal has remanded the matter to Nominee to decide the same in accordance with law. The petitioners further prayed that the court may also quash and set aside the order of the Tribunal

2. The facts giving rise to this petition are as under:

2.1 The petitioners are elected Directors of the respondent bank and their term will come to an end in April 2002.

2.2 It has been stated in the petition that the Registrar of the Co-operative Societies had visited the respondent Bank and vide letter dated 3.2.2001 informed the respondent bank to remove the petitioners from the office of the Directors under bye-law 36(7) and informed accordingly. Copy of the said letter is annexed at Annexure-A to this petition which is produced at page 14.

2.3 It has been stated that on the basis of the said communication the bank by its communication dated 5.2.2001 was pleased to remove the petitioners as Directors by virtue of the meeting held on 5.2.2001. The said order has been annexed at Annexure-B to this petition.

2.4 Being aggrieved and dissatisfied with the aforesaid action of the respondent bank, the petitioners have instituted necessary proceedings before the Board of Nominees at Anand. The Board of Nominees in Lavad Suit No. 264 of 2001 by order dated 12.3.2001 did not grant the order of injunction staying operation of the order

dated 5.2.2001.

2.5 Being aggrieved and dissatisfied with the aforesaid action of the Board of Nominees, the petitioners have preferred Revision Application No. 143 of 2001 before the Tribunal. Along with the said revision application, the petitioners have preferred an interim injunction application at Exh. 4 which was granted by the Tribunal by its order dated 24.3.2001 permitting the petitioners to discharge their duties as Directors of the respondent Bank. A copy of the said order has been annexed at Annexure-C to this petition.

2.6 Being aggrieved and dissatisfied with the aforesaid order, the respondent Bank preferred Special Civil Application No. 2252 of 2001 before this court and prayed for stay of the order passed below application 4 in Revision Application No. 143 of 2001. When the matter reached hearing, this court (Coram: P.K. Sarkar, J) by its order dated 30.3.2001 directed the Tribunal to decide and dispose of the Revision Application No. 143 of 2001 on or before 9.4.2001. This court further directed that till that time, this court declined to interfere with the order passed by the Tribunal in the Revision Application No. 143 of 2001. A copy of the said order has been produced at Annexure-D to this petition.

2.7 Thereafter, the Tribunal heard the matter on 9.4.2001 and rejected the said revision application by its order dated 10.4.2001 and also ordered to vacate the order passed below Exh. 4 on 24.3.2001 and directed the Board of Nominees to decide and dispose of the Arbitration Suit within two months from the date of the order passed by the Tribunal.

2.8 It appears that in this case the Division Bench of the Tribunal has at length discussed various aspect of the matter and considered the provisions of law, Rule 32. The Tribunal thereafter came to the conclusion that the bank has removed the petitioner by passing Resolution dated 5.2.2001 and the bank has exercised the said power under bye-law 36(7) of the bye-laws. In para 19 of the order the Tribunal was pleased to pass the following order:-

"In view of the aforesaid observation, prima facie, it is being established that both the applicants were defaulter at certain stages in their respective accounts and, therefore, as per bye law 36.7, they would be incurring disqualification. In the larger interest of the

co-operation movement as per Rule 32(1)(A) and bylaw, the disqualification has been considered and in the matter of cooperative bank, it is the duty of the director to regulate the defaulters and therefore, such disqualification cannot be viewed lightly. In such circumstances, order passed by the learned Nominee does not call for interference. Therefore, following order is passed.

ORDER

Revision application No. 143/2001 is rejected.

No order is made as regards costs.

Pronounced today, this 10.4.2001.

The orders passed on the revision application No.

143/2001 are suspended for a period of ten days i.e. upto 20.4.2000 so as to enable the applicants to challenge the same before the Hon'ble High Court i.e. the stay order passed below Exh. 4 shall continue to remain in force upto 20.4.2001. Learned Nominee should dispose of the suit finally within two months and the parties should extend their co-operation."

2.9 Being aggrieved and dissatisfied with the said order, the petitioners have filed this present petition before this court.

3.1 The learned counsel for petitioner Mr. N.D. Nanavati, senior counsel with Mr. Pradeep Patel appeared for petitioner. He has relied on the provisions of the Co-operative Societies Act particularly Rule 32 of the Gujarat Co-operative Societies Rules which provides qualification for the members of the Committee. He further submitted that the order passed by the respondent Bank was without giving an opportunity of being heard to the petitioners. In any view of the matter, rule of natural justice requires hearing before removing the Directors in this behalf.

3.2 He has also relied on Rule 32(1)(A) of the Co-operative Societies Rules read with bye-laws 36(7) of the Bye-laws of the Bank. Rule 32 and bye-law 36 read as follows:-

"Qualification for Members of the Committee -

- (1) Every member of a society who is entitled to vote shall be eligible for appointment as a member of a committee thereof if -
- (a) he is not in default in respect of any loan taken by him for such period as is specified in the bye-law; or
 - (b) he has not directly or indirectly any interest in any subsisting contract made with the society or in any property sold or purchased by the society or any other transaction of the society except in any investment made in or any loan taken from the society; or
 - (c) if he is otherwise disqualified for appointment as such member; or
 - (d) he is not held responsible under section 82; or
 - (e) no order for recovery of costs is made against him by a Magistrate under Section 91, or
 - (f) no order is made against him under section 93; or
 - (g) if he is not found guilty of the offences under Section 147 or any offence under Section 403 of the Indian Penal Code in respect of the property of any society, in sub-rule (1) shall vacate the office and if he does not vacate such office, he shall be removed by Registrar as such member.

Provided that the Registrar shall before making such order of removal give the person concerned an opportunity of being heard.

1-A A member of the committee who incurs any of the disqualification specified."

Bye-law 36:

Generally, even before completion of the term of his office, if any director would have been having any one disqualification out of the following disqualifications, he shall be considered to have vacated his office.

6. If the bank is required to initiate suit for arbitration or the steps for recovery of the dues against him or as a guarantor of the borrower or the borrower for whom he has stood as the guarantor.

7. If he commits default in making payment of the dues of loan, instalment, interest or instalment of interest in time or the person for whom he has stood as guarantor commits default in making payment of loan, instalment of loan or instalment of interest or interest in time."

3.3 The learned counsel for the petitioner has relied on the communication dated 3.2.2001 issued by the District Registrar to the Chairman of the Bank and thereafter the impugned order dated 5.2.2001 was passed in which the petitioner has been removed as a director from the office of the directors. He submitted that by this order the Chairman has not exercised his power independently but has relied on communication dated 3.2.2001 which I have referred earlier. The submission of the learned counsel for the petitioner is that the Chairman has not exercised his power independently but at the dictate of somebody i.e. in this case the Registrar, and therefore the said order is bad in law and violative of principle of natural justice.

3.3(a) In support of this he has relied on the Administrative Law by Prof. Wade and Forsyth, seventh edition (paper back edition of 1995) at page 358 in which it is held as under:-

"Surrender, Abdication, Dictation

Power in the wrong hands:

Closely akin to delegation, and scarcely distinguishable from it in some cases, is any arrangement by which a power conferred upon one authority is in substance exercised by another. The proper authority may share its power with some one else, or may allow some one else to dictate to it by declining to act without their consent or by submitting to their wishes or instructions. The effect then is that the discretion conferred by Parliament is exercised, at least in part, by the wrong authority, and the resulting decision is ultra vires and void. So strict are the courts in applying this principle that they condemn some administrative arrangements which must seem quite natural and proper to those who make them....

Ministers and their departments have several times fallen foul of the same rule, no doubt equally to their surprise."

3.4 The learned counsel for the petitioner has also relied on the decision of the Hon'ble Supreme Court in the case of ANIRUDHSINHJI KARANSINHJU JADEJA & ANR. VS. STATE OF GUJARAT reported in 36(2) GLR 1726 (SC) in which at para 14 on page on 1731 the Hon'ble Supreme Court has observed thus:

"The present was thus a clear case of exercise of power on the basis of external dictation. That the dictation came on the prayer of the DSP will not make any difference to the principle. The DSP did not exercise the jurisdiction vested in him by the statute and did not grant approval to the recording of information under TADA in exercise of his discretion."

3.5 He has also relied on the Division Bench judgement of this court (Coram: B.C. Patel and K.M. Mehta, JJ) where the Division Bench has also relied on the aforesaid passage from Prof. Wade and Forsyth as well as passage from De Smith, Woolf and Jowell, Judicial Review of Administrative Action, 5th edition (1995), Chapter II (Procedural Fairness: Fettering of Discretion) in para 11-001 and 11-003, in the case of GUJARAT GAS CO. LTD. VS. JOINT C.I.T. reported in 245 ITR 84 in which on page 109 the court has observed thus:-

"So far as the circular issued by the Central Board of Direct Taxes is concerned, which is alleged to have been issued under Section 119 of the Act, it is also required to be considered from another angle. That refers to assessments which are to be made under Section 143(3) of the Act. Thus, in particular types of cases, direction is given to the Assessing Officers as to how the assessment is to be made, i.e. in scrutiny cases under Section 143(3) of the Act, neither the income can be assessed at a figure lower than the returned income nor the loss can be assessed at a figure higher than the loss nor further refund can be given except what was due on the basis of the returned income. Thus, in all cases of scrutiny, direction is given despite the fact that the section mandates that no such order, instruction or direction shall be issued to require any income tax authority to make a

particular assessment or to dispose of a particular case in a particular manner. The income tax authority thus by issuance of the circular directed the quasi-judicial officer to assess cases of particular nature in a particular manner."

3.6 The learned counsel further submitted that the order has been passed by the District Registrar without hearing the petitioner and therefore also there is violation of principles of natural justice. He has also submitted that the order of the authority is contrary to the judgement of the Bombay High Court in the case of KERBAJI MAROTI RAO SHINDE VS. STATE OF MAHARASHTRA AND OTHERS reported in 1988 C.T.J. 307 in which on page 311 at para 6 the court has observed as follows:-

"Therefore the only question which requires consideration in the present writ petition is to find out as to whether the law laid down by this Court in Keshavrao's case will apply even to Rule 58(2) of the Act. We would like to make it very clear that in this case we are concerned with Rule 58(2) which deals with the cessation of membership after the person is elected as a member of the Society which is akin to removal of a member from the membership of the Committee of the Society in view of incurring a disqualification mentioned in sub-rule (1) of Rule 58. In our view, if Section 78 is read in its context and harmoniously with the other provisions of the Act, including Section 73FF, a conclusion is inevitable that the law laid down by this Court in Keshavrao's case must apply even to an action contemplated by Rule 58. Rule 58(1) lays down the disqualifications and Rule 58(2) provides consequence or the result of disqualification. Though in a given case a declaration could relate back to the date of the disqualification itself, that does not mean that no adjudication or order is necessary. When a disqualification has been incurred by a member, is in itself in doubt or disputed, then an adjudication is obviously necessary. An enquiry in that behalf is not administrative but is judicial or quasi-judicial in nature. This seems to be the reason why a provision is made under Section 78 of the Act, for removal of member if he stands disqualified by or under the Act for being a member, after giving the member of an opportunity of being heard."

3.7 He further submitted that in any view of the matter the order is bad in law because before passing the order the bank has not given any opportunity of being heard to the petitioner. Therefore, the same is violative of rule of natural justice and the same is required to be quashed and set aside. He has also relied on Rule 32 of the Rules which provides qualifications for the members of the Committee. He submitted that under Rule 32 of the Societies Rule if any disqualification occurs then the Registrar has a duty to hear the person before he is removed. He submitted that principle is that Rule 32 of the Rules must be read with under bye-law 36(7) and therefore principle of rule of natural justice read with bye-law 36(7) even though bye-law 36(7) does not provide for hearing of the petitioner.

4. Shri S.B. Vakil, learned advocate along with Shri Shirish Joshi on behalf of the bank stated that respondent No. 2 The Vallabh Vidyanagar Co-op. Bank Ltd. is a Co-operative Society and a Co-operative Bank registered under the Gujarat Co-operative Societies Act, 1961 and the rules framed thereunder. Respondent No. 2 is also a Co-operative bank governed under the Act as well as the Banking Regulation Act. Petitioner No. 1 Chimanbhai Motibhai Patel was the Director and petitioner No. 2 Bhurabhai Vashrambhai Aiyar was the Managing Director of the respondent No. 2 Bank.

4.1 The bye-laws of the respondent No. 2 Bank provides for constitution of the Board of Directors of respondent No. 2 Bank as also the post of Managing Director. They are governed under the provisions of the Act, the Rules and the Bye-laws. Bye-law No. 31 provides for the Board of Directors who are elected for a term of three years. There are 11 Directors. Disqualification of Directors is provided in bye-law 35 and sub-clause (iv) thereof provides that, if one is defaulter as loanee or surety of a loanee, he would not be qualified to remain as Director. Bye-law No. 36 provides for automatic cessation of the post of Director, if the contingency as provided in the said bye-law No. 36 happens. If one is defaulter in making payment of instalment, interest over instalment etc. as loanee or where he is surety the main loanee commits such default, the office of the Director would automatically become vacant on such director ceases to be Director.

4.2 The learned counsel for the respondent Bank

submitted that petitioners have utilised the office of the Director for their own purpose. Not only that, they themselves obtained loan but they have obtained loan in the names of the family members also.

4.3 Petitioner No. 1 obtained loan of Rs. 10 lakhs and thereafter the limit was extended for Rs. 2 lakhs further from 2.1.2000 but till then, he had utilised the amount of Rs. 10 lakhs only where he had enjoyed the said limit of Rs. 10 lakhs and even beyond that. In the case of Housing Loan account of his wife, where petitioner is a surety, there is default to a large extent.

4.4 So far as petitioner No. 2 is concerned, vehicle loan account No. 146 has remained outstanding to a huge amount. The vehicle loan account 613 of his wife Meghiben, another account of his son Jaipal, the third account of his concern ABCF Associates and another accounts running in the names of his brother Savabhai and nephew Shyamkumar are running in default. The respondent Bank craves leave to refer to and rely on the computerised copies of accounts in this behalf.

4.4(a) Learned counsel for the respondent has stated that though rules of natural justice namely nemo judiax in causa sua and audi alteram partem have now a definite meaning and connotation in law and their content and implications are well understood and firmly established, they are nonetheless not statutory rules. Each of these rules yields to and changes with the exigencies of different situations. They do not apply in the same manner to situations which are not alike. These rules are not cast in a rigid mould nor can they be put in a legal strait-jacket. They are not immutable but flexible. These rules can be adopted and modified by statutes and statutory rules and also by the constitution of the Tribunal which has to decide a particular matter and the rules by which such Tribunal is governed. The learned counsel submitted that while facts are admitted or undisputed facts are there, particularly, when the directors have obtained loan, they have committed default. In this situation, no complaint can be made that principle of natural justice has to be observed in this behalf. Without hearing even the Directors, the bank can initiate action as per the provisions of the Act and Rules. As the Bank acts as per the rules, there is no violation of principle of natural justice and no prejudice will be caused to the petitioners.

4.5 Shri S.B. Vakil, learned advocate along with

Shri Shirish Joshi appeared on behalf of the bank and tried to support the order of the Tribunal in this behalf. The learned counsel submitted that this court may not exercise jurisdiction under Articles 226 and 227 of the Constitution. The Tribunal has passed only orders by which it remand the matter to Nominee to decide the same in accordance with law and no final order is passed. In any view of the matter, this court may not pass any order or exercise its jurisdiction in this behalf. He has relied on the judgement of the Hon'ble Supreme Court in the case of UNION OF INDIA VS. M/S. GRAPHIC INDUSTRIES CO. reported in AIR 1995 SC 409, M.P. MITTAL VS. STATE OF HARYANA reported in AIR 1984 SC 1888.

5.1 The learned counsel for the respondent has submitted that in the light of the aforesaid observation, he relies on the following decisions of the Hon'ble Apex Court:-

(i). CENTRAL BANK OF INDIA VS. ROOPLAL BANSAL reported in (1999) 9 SCC 254 in which on page 255 at paragraph No. 6, the Hon'ble Supreme Court has observed as under:-

"In our opinion, the High court was not right in entertaining the writ petition. The transaction between the parties was purely a commercial one. Admittedly, the respondent had stood as guarantor in respect of the loans which had been advanced by the appellant. For the realisation of the amount, the appellant had filed a suit in a court of competent jurisdiction. If the respondent had any grievance in respect of the letter dated 7.10.1986, then the proper remedy available to the respondent was to file a Civil Suit and the High Court ought not to have entertained a writ petition under Article 226 of the Constitution especially when disputed questions of fact had to be gone into. On this ground alone, the judgement of the High Court is liable to be set aside."

(ii) He has further relief on the decision of the Hon'ble Supreme Court in the case of KOYILERIAN JANAKI AND OTHERS VS. RENT CONTROLLER (MUNSIFF) CANNANORE AND OTHERS reported in (2000) 9 SCC 406 in which on page 409 at paragraph No. 4, it is observed thus:-

"Further we are in agreement with the argument of learned counsel for the appellant that it was not appropriate for the High Court to have interfered

with the order passed by the District Judge in exercise of its power under Article 227 of the Constitution. The proceedings in the present case arose under a special Act governing the landlord and tenant relationship and disputes. The Act does not provide any second appeal or revision to the High Court. The purpose behind for not providing such remedy is to give finality to the order passed under the Act. The power under Article 227 is exercisable where it is found by the High Court that due to a certain grave error an injustice has been caused to a party. For this reason also, the judgement of the High Court deserves to be set aside."

(iii) ASHOK KUMAR AND OTHERS VS. SITA RAM reported in (2001) 4 SCC 478 at Para 17 on page 484, it is observed thus:

"The question that remains to be considered is whether the High Court in exercise of writ jurisdiction was justified in setting aside the order of the Appellate Authority. The order passed by the Appellate Authority did not suffer from any serious illegality, nor can it be said to have taken a view of the matter which no reasonable person was likely to take. In that view of the matter there was no justification for the High Court to interfere with the order in exercise of its writ jurisdiction. In a matter like the present case where order passed by the statutory authority vested with power to act quasi-judicially is challenged before the High Court, the role of the High Court is supervisory and corrective."

5.1(a) In this matter the respondent has stated that the petitioner has raised only question of fact as to whether the Directors have committed default in payment of their dues or not. The Directors have obtained more amount of loan than the amount which has been sanctioned and they have to pay certain amount of interest in this behalf. Whether the Directors have taken more amount of loan and what interest is to be paid is an essential question of fact and from the record it appears that the Directors have tried to misuse their position of Director and they themselves have obtained loan from the bank which was originally sanctioned by the bank. Therefore, the Directors have not come with clean hands in this behalf and in view of the same, I do not intend to exercise my

jurisdiction under Article 226/227 of the Constitution of India. The petitioners themselves are guilty of taking more amount of loan than what has been sanctioned in this behalf. The Tribunal has already observed that both the Directors were defaulters at certain stages in their respective accounts and larger amount of interest is due and payable by them. The Tribunal has further directed that the Nominee should dispose of the suit finally within two months and the parties should extend their co-operation. In view of the same, when the Nominee is going to decide the matter finally and to that extent the order of the Tribunal is interim order and if any final order is passed by Nominee, the petitioners can always challenge the same as provided under the law. Since the petitioners have alternative, efficacious and convenient remedy available under the law, I do not want to exercise my jurisdiction under Articles 226/227 of the Constitution of India.

5.1(b) In view of the same, the Nominee will consider all the contentions raised by the petitioners in this behalf which I have set out earlier and he will decide the same in accordance with law. The petitioners will also have a chance of producing any further evidence in this behalf as to whether they have defaulted in their accounts or not.

5.2 In view of the preliminary contention raised by the learned counsel for the respondent which is supported by three recent judgements of the Hon'ble Supreme Court, I am of the view that it is not necessary to consider the case of the petitioner on merits of the matter at length in this behalf.

5.3 In view of the finding of the Tribunal at the interim stage and in view of the judgements of the Hon'ble Apex Court, I am of the view that this being an interim order, I do not find any reason to exercise jurisdiction under Article 226 of the Constitution. All the contentions which have been raised by the petitioner can be raised at the time of final hearing of the matter. As I have decided the matter only on the ground of alternative remedy and not on merits of the matter, neither the Nominee nor the Tribunal will be influenced by the order of this court.

6. In the result the petition is rejected. No order as to costs.

(K.M. MEHTA, J)

(pkn)

7. After the pronouncement of the judgement, learned counsel for the petitioners Mr. Pradeep Patel prays that the interim relief which was granted earlier may be continued. Mr. Shirish Joshi, learned advocate for the respondent strongly objected to it.

7.1 Mr. Patel, learned advocate for the petitioners, has stated that in this matter the Tribunal has passed order dated 24.3.2001 and granted ad-interim injunction removing the petitioners as Directors of the Bank. When the said order was challenged before this court, this court by its order dated 20.4.2001 was pleased to continue stay order till 26.4.2001 and the said order has been continued till today and therefore this court must continue ad-interim relief for a week from today.

7.2 On the other hand, Mr. Joshi, learned counsel for the respondent has invited my attention to the earlier order dated 30.3.2001 as well as the order of the Tribunal passed on 10.4.2001. He further submitted that pursuant to the aforesaid order of this court and the Tribunal, as the bank has not called any meeting, the petitioners have not attended any meeting of the bank in this behalf in view of the pendency of the writ petition. However, he submitted that the bank desires to call Annual General Meeting on 30.9.2001 for considering the financial result of the bank and before that the bank desires to call meeting of the Board of Directors and therefore he prays that in view of the final judgement of this court today, if the bank calls for any meeting of Directors, the petitioners may not be entitled to attend the meeting of the Board of Directors. In support of the same, he has relied on the judgement of the Hon'ble Supreme Court in the case of STATE OF ORISSA VS. MADAN GOPAL reported in AIR 1952 SC 12.

8. In view of the rival submissions made by the parties, I am of the view that when the Tribunal had already granted injunction earlier by order dated 24.3.2001 which order was continued by this court earlier on 20.4.2001 and which has been continued till today, in the interest of justice when the petitioners desire to challenge the order before the Division Bench of this court, interim relief be continued upto 24.9.2001.

Date: 19.9.2001 (K.M. MEHTA, J)